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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. 115

THE DELANO-EARLIMART, EXETER, IVANHOE, LINDMORE, LINDSAY-STRATHMORE, LOWER TULE RIVER, MADERA, ORANGE COVE, PORTERVILLE, SAUCELITO, STONE CORRAL, TERRA BELLA and TULARE IRRIGATION DISTRICTS; and THE SOUTHERN SAN JOAQUIN MUNICIPAL UTILITY DISTRICT,

Petitioners,

vs.

EVERETT G. RANK, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' BRIEF

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Petitioners,

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Respondents.

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PETITIONERS' BRIEF

This brief is filed by the above-named irrigation and municipal utility districts of the State of California (hereinafter called "the districts") as petitioners in one of three related cases now before this Court on writs of certiorari to review the same judgment of the Court of Appeals for the Ninth Circuit.

The petitioners in the other two cases, October Term, 1962, Nos. 31 and 51, are certain officials of the United States Bureau of Reclamation and the City of Fresno. The districts support the position of the federal officials and are in opposition to the City of Fresno.

This litigation involves the Central Valley Project, a federal reclamation project built and operated by the United States. These petitioners are all public districts organized under California law, the thirteen irrigation districts under the Irrigation District Law, Calif. Water Code §§ 20500 *et seq.*, and the Southern San Joaquin Municipal Utility District under the Municipal Utility District Act, Calif. Public Utilities Code §§ 11501 *et seq.* They are all specifically authorized to contract and cooperate with the United States. Calif. Water Code §§ 23175-23204; Calif. Public Utilities Code § 12844. Each has contracted with the United States for water service from the Friant-Kern or Madera Canals of the Central Valley Project, and their interest in this litigation is as contractors for a project water supply. Their contracts are all substantially similar to those held valid in *Ivanhoe Irr. Dist. v. McCracken*, 357 U.S. 275 (1958).[1]

This brief is intended as a further demonstration of how, in the words of this Court, "the United States

[1]The plaintiffs asked that the contracts "be declared null and void." 1 R. 39; see also *id.* 15-24, 33. The district court did not act on this request and held that the validity of the contracts had been eliminated as an issue in the litigation. 3 R. 1086-91. In any event, as we show in Part II of our argument, the United States not being a party, the validity of the contracts could not be collaterally attacked. *Balter v. Ickes*, 89 F. 2d 856, 859 (C.A.D.C. 1937). Of course, even if it could be, the *Ivanhoe* case settled the legality of contracts of this type.

and various state agencies, with commendable faith and steadfastness to one another, have embarked upon and nearly completed a most complicated venture. . . ." *Ivanhoe Irr. Dist. v. McCracken*, 357 U.S. 275, 279 (1958).

OPINIONS BELOW

Prior to the opinions of the Court of Appeals relating to the judgment now being reviewed, there were six reported opinions involving various aspects of this litigation, four by the district court and two by the Court of Appeals as follows:

Rank v. Krug, 90 F. Supp. 773 (S.D. Calif. 1950);

United States v. United States District Court, 206 F. 2d 303 (9th Cir. 1953);

State of California v. United States District Court, 213 F. 2d 818 (9th Cir. 1954);

Rank v. United States, 16 F.R.D. 310 (S.D. Calif. 1954);

City of Fresno v. Edmonston, 131 F. Supp. 421 (S.D. Calif. 1955);

Rank v. (Krug) United States, 142 F. Supp. 1 (S.D. Calif. 1956).

With respect to the judgment now being reviewed, the opinion of the Court of Appeals entered on March 31, 1961, as corrected upon petition for rehearing on August 14, 1961, and the clarifying opinion upon petition for rehearing entered August 14, 1961, are reported as *State v. Rank*, 293 F. 2d 340 (9th Cir. 1961),

and are printed in the record. 7 R. 364-394, 397-400. The opinion of the Court of Appeals upon rehearing entered February 14, 1962, has not been reported, but is printed in the record. 7 R. 400-402.

JURISDICTION

The judgment of the Court of Appeals was first entered on March 31, 1961. 7 R. 395. Petitions for rehearing by the districts were granted by the Court of Appeals on August 14, 1961. 7 R. 396. Upon rehearing, an opinion and order were entered on February 14, 1962, 7 R. 400-402, and an amended judgment was entered in accordance therewith. 7 R. 402-403.

The districts' petition for writ of certiorari was filed in this Court on May 14, 1962, and was granted on June 25, 1962. 7 R. 405. The printed record was received by counsel for the districts on September 25, 1962.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. Reclamation Act of June 17, 1902, § 7, 32 Stat. 389, 43 U.S.C. § 421:

> "That where in carrying out the provisions of this act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the

United States by purchase or by condemnation under judicial process, and to pay from the reclamation funds the sums which may be needed for that purpose. . . ."

2. Central Valley Project Reauthorization, Rivers and Harbors Act of August 28, 1937, § 2, 50 Stat. 850:

". . . That the entire Central Valley project, California, heretofore authorized and established under the provisions of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) and the First Deficiency Appropriation Act, fiscal year 1936 (49 Stat. 1622), is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for the reclamation of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes: Provided further, That, except as herein otherwise specifically provided, the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation, and maintenance of the dams, canals, power plants, pumping plants, transmission lines, and incidental works deemed necessary to said entire project and the Secretary of the Interior may enter into repayment contracts, and other necessary contracts, with State agencies, authorities, associations, persons, and corporations, either public or

private, including all agencies with which contracts are authorized under the reclamation law, *and may acquire by proceedings in eminent domain, or otherwise, all* lands, rights-of-way, *water rights,* and other property *necessary for said purposes:* And provided further, That the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses; and, third, for power." Emphasis added.

QUESTIONS PRESENTED

1. Whether the operation by federal officials of a federal reclamation project and their notification of intent with respect thereto resulted in an authorized taking by physical seizure of such vested water rights as may have been interfered with by such operations, and whether the exclusive remedy for such taking is a suit for compensation under the Tucker Act, so that an action by the owners of such rights to enjoin such operation as an unauthorized trespass should be entirely dismissed.

2. Whether the districts should not be dismissed as defendants in an action to enjoin the alleged illegal interference with vested water rights through the operation of a federal reclamation project when the districts make no claim on their own behalf to the plaintiffs' alleged rights, when the districts' only connection with the action is as contractors with the United States obligated to take and pay for water delivered by the United States from the project, and

when the United States has been dismissed as a defendant.

3. We adopt and incorporate by reference the questions presented on page 2 of the petition for writ of certiorari filed by the Solicitor General in *Dugan, et al. v. Rank, et al.*, October Term, 1961, No. 366 and granted on April 2, 1962. 7 R. 404. The *Dugan* case is now numbered October Term, 1962, No. 31.

STATEMENT OF THE CASE

A. THE PHYSICAL FACTS

1. Description of the Central Valley Project.

This case resulted from the construction and operation of Friant Dam on the San Joaquin River in the great Central Valley of California. Friant Dam and its related works are part of the Central Valley Project which is being constructed and operated as a federal reclamation project by the United States Bureau of Reclamation.

The Central Valley Project was originally conceived and planned by the State of California as part of the State Water Plan. Calif. Water Code §§ 10000 *et seq.* This project was authorized for construction by the State Water Project Authority in the Central Valley Project Act of 1933. Calif. Stats. 1933, c. 1042, p. 2643, effective after referendum election January 13, 1934, now Calif. Water Code §§ 11100 *et seq.*

For various reasons, largely financial arising out of the economic depression, the State did not undertake

the construction of the project. In 1935 the United States authorized the Central Valley Project as a federal undertaking.[2] The State Water Project Authority was authorized to and did cooperate with the United States to the end that the people of the State would receive the benefits to be derived from the construction, operation, and maintenance of this project. Calif. Water Code § 11500. The federally authorized project, although differing in a few details not here material, is essentially the same as the Central Valley Project authorized for State construction.

A consideration of what is being done by the Central Valley Project at Friant Dam can be best understood in the light of the geographic, climatic, water requirement, and water supply facts in the entire Central Valley. The operation of Friant Dam is related to the operation of Shasta Dam, more than 300 air miles to the north, to the needs for water near Bakersfield, more than 120 air miles to the south, and to the water supplies and requirements at many places in between. A brief description of this integrated operation follows.

The Central Valley of California is a basin approximately 500 miles long and averages more than 100 miles in width. It is bounded on the east by the Sierra Nevada Mountains, on the west by the Coast Range, on the north by the Siskiyou Mountains, and on the south by the Tehachapi Mountains. It includes more than one-third of California.

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[2] For a description of and citations to the federal authorizations, see Graham, *The Central Valley Project: Resource Development of a Natural Basin*, 38 Calif. L. Rev. 588, 591 *et ff.* (1950).

The northern portion of this basin is the Sacramento Valley and contains the Sacramento River system. The southern portion of this basin is the San Joaquin Valley and contains the San Joaquin River system. The Sacramento River arises in the extreme northern end of the basin and flows southerly to the vicinity of the City of Sacramento and then southwesterly into San Francisco Bay. The San Joaquin River arises in the Sierra Nevada northeast of the City of Fresno, flows westerly to the trough of the San Joaquin Valley in the vicinity of the town of Mendota, and then northwesterly to the Sacramento-San Joaquin Delta where it joins the Sacramento River.

The precipitation and consequently the water supply is greater in the Sacramento Valley than in the San Joaquin Valley. A primary objective of the Central Valley Project is to transport surplus water from the Sacramento Valley to the San Joaquin Valley for irrigation use. This is accomplished in part by the physical transportation of Sacramento River water into the San Joaquin Valley for application to new areas and in part by the exchange of Sacramento River water for San Joaquin River water.

The mechanics of this exchange of water are as follows. The largest reservoir of the Central Valley Project is Shasta Reservoir on the Sacramento River near the City of Redding. Water is stored there and later released into the Sacramento River where it flows approximately 300 miles into the Sacramento-San Joaquin Delta. The project also includes Folsom

Reservoir on the American River, a tributary to the Sacramento River, authorized in 1949.[3] Water released from storage in Shasta and Folsom Reservoirs and surplus natural flow of the Sacramento River are conducted across the Sacramento-San Joaquin Delta through natural channels and through the Delta Cross Channel constructed as part of the project. From this water and a much smaller quantity flowing into the Delta from the San Joaquin River, a supply is pumped by the Tracy Pumping Plant from the Delta into the Delta-Mendota Canal, a lift of approximately 200 feet. The water then flows by gravity in the Delta-Mendota Canal along the westerly side of the San Joaquin Valley southerly for 117 miles to Mendota Pool where it is discharged into the San Joaquin River for use in an area which formerly was irrigated to a large extent by the San Joaquin River.

The San Joaquin River water which, except for the substitution or exchange of Sacramento River water, would have been used in the area near and down-

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[3] 63 Stat. 852. In addition the project includes, among other works, the Trinity River Division, which will divert about 1,000,000 acre feet into the valley, authorized in 1955. 69 Stat. 719. Related to Central Valley project operations in the San Joaquin Valley are Isabella Dam on the Kern River and Pine Flat Dam on the Kings River, both built by the United States Corps of Engineers. The latter is intended "to provide supplemental irrigation water, flood control, and a power supply for an area of about 800,000 acres of developed lands around Fresno. . . ." Bureau of Reclamation, Project Feasibilities and Authorizations 288 (1957). See generally *id.* 240-90. For a complete list of project features prior to the authorization of the San Luis Unit, see 2 Engle, Central Valley Project Documents, 50-52, H. Doc. No. 246, 85th Cong., 1st Sess. (1957). The San Luis Unit, a joint federal-state undertaking which will make water available to an additional federal service area on the west side of the San Joaquin Valley, was authorized in 1960, 74 Stat. 156.

stream from Mendota Pool, plus other water originating in the San Joaquin River, is stored and diverted by Friant Dam approximately 50 miles upstream from Mendota Pool. This water is transported for use on the east side of the San Joaquin Valley by gravity flow 153 miles south to the vicinity of Bakersfield through the Friant-Kern Canal and 37 miles north into Madera County through the Madera Canal.[4]

2. The San Joaquin River Between Friant and Mendota.

Since the water behind Friant Dam as it is diverted into the Friant-Kern and Madera Canals is at an elevation approximately 280 feet higher than Mendota Pool, *cf.* 142 F. Supp. at 173, 7 R. 249, Sacramento River water importation has an effect as far south as Bakersfield without the necessity of installing a pumping plant at Mendota Pool and lifting the water to a higher elevation. However, this exchange of Sacramento River water for San Joaquin River water at Mendota Pool and the storage and diversion of San Joaquin River water at Friant Dam materially reduces the flows of the San Joaquin River in the 50-mile reach between Friant Dam and Mendota Pool.

The 50-mile reach of the San Joaquin River between Friant Dam and Mendota Pool and, more particularly, the shorter reach between Friant Dam and Gravelly Ford (approximately 14 miles upstream

[4]The physical problem and how the project was planned to meet it are also described in *Ivanhoe Irr. Dist. v. McCracken*, 357 U.S. 275, 280-84, (1958), and *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 729-30 (1950).

from Mendota Pool) have been the subject of water supply and water rights cooperative studies by the state and federal government for many years. In *United States v. Gerlach Live Stock Co.*, this Court said: "[E]xcept for occasional spills, only a dry river bed will cross the plain below the [Friant] dam. Here, however, surplus waters from the north are utilized. . . ." 339 U.S. at 729. Actually, the river has not been and will not be dried up below Friant. The United States is under a contractual obligation to numerous landowners to maintain a "live stream". 3 R. 915-16, 917. This obligation has been described as "the most perfect water right in the State of California." 3 R. 1131.

Even the initial planning of the project, however, recognized that the flows between Friant and Mendota would be small. Thus no power plant was installed at Friant because it was contemplated that so much water would be diverted north and south that there would be an insufficient flow westerly through the dam to operate the plant. 18 Ops. Cal. Atty. Gen. 31, 33-34 (1951). It was recognized that some arrangements would have to be made to meet, or to pay for the infringement of, or to extinguish the water rights between Friant and Mendota. Calif. Water Project Authority, Report No. 3, Definition of Rights to the Waters of the San Joaquin River proposed for Diversion to Upper San Joaquin Valley, 1-2 (1936), Ex. Pffs. 410, Transcript, Dec. 15, 1954, pp. 23204-23206. The principal alternative adopted was payment for infringement of rights. With the cooperative federal-

state studies as a background, the federal government entered into negotiations as early as 1939 with the water users along the 50-mile reach for settlements regarding the proposed operation of Friant Dam. For example, in some instances water rights were purchased, in other instances the government paid for substitute diversions, and generally the government undertook to make direct releases from Friant Reservoir into the river. Graham, *supra*, 38 Calif. L. Rev. at 598-599; 3 R. 914-18, 995-96. As of December 4, 1952, the United States had entered into 215 such contracts involving 11,687.9 acres at a cost of $215,325. Ex. Dfts. B-1, Transcript, Jan. 22, 1953, p. 14999.

Some water users along this reach of the river were not satisfied with the quantities of releases which were proposed, on the bases, among others, that (1) these releases were not sufficient to allow convenient surface diversion from the river, and (2) these releases were not sufficient to meet the ground water demands which they contended had been supplied in the past by the normal flows. Unwilling to contract, and asserting but not pursuing their remedy under the Tucker Act, these water users commenced this litigation.

B. PROCEEDINGS IN THE DISTRICT COURT

The originally named plaintiffs were owners of land along the San Joaquin River downstream from Friant in the general vicinity of Lane's Bridge where State Highway 41 crosses the river. See map, *Rank v. (Krug) United States*, 142 F. Supp. 1, 40 (S.D. Cal.

1956).[5] They began the action in the Superior Court of the State of California in Fresno County on September 25, 1947, 1 R. 78, seeking to enjoin officials of the United States from storing and diverting water of the San Joaquin River upstream at Friant Dam, a unit of the Central Valley Project, or in the alternative to enforce a physical solution. 1 R. 38-9. The action was removed to the United States District Court for the Southern District of California on October 6, 1947, by the United States attorney on behalf of the defendant federal officials; no motion to remand was ever made and the district court held the removal was proper. *Rank v. Krug,* 90 F. Supp. 773, 779 (S.D. Cal. 1950).

The named plaintiffs first claimed to represent a class of riparians owning 50,000 acres, and a class of overlying owners owning 500,000 acres. 1 R. 30-33. The latter figure was later enlarged to 600,000 acres, or almost 938 square miles. 1 R. 80, 81. The district court found the class area to be that within the "Lee Line," about 313,640 acres, 3 R. 1037-31, including a portion of the City of Fresno. 142 F. Supp. at 40. On appeal, the class representation was held insufficient by the Court of Appeals because the plaintiffs also claimed appropriative and prescriptive rights as

[5]This map is not included in the reprint of the district court's opinion in 7 R. 22-286. The named plaintiffs identified themselves as the owners of lands within Exhibit A to the complaint. 1 R. 7, 40. These lands are all within Township 12 South, Range 20 East, Mount Diablo Base and Meridian, except for one lot in Township 11 South. 1 R. 48. The western boundary of Range 20 East intersects the river about three miles west of Lane's Bridge, *i.e.*, about midway between Lane's Bridge and Herndon. 6 R. 2340; see map, 142 F. Supp. at 40.

well as riparian and overlying rights. *State v. Rank,* 293 F. 2d 340, 348 (9th Cir. 1961), 7 R. 374-76. The plaintiffs have not challenged this ruling of the Court of Appeals, so it is no longer in issue in the case. *Tennessee Coal Co. v. Muscoda,* 321 U.S. 590, 593 (1944); Annot., 1 L. Ed. 2d 1820, 1825-7 (1957).

Two of the districts, the Madera Irrigation District and the Southern San Joaquin Municipal Utility District, were named as defendants in the original complaint. 1 R. 3-4. The other districts were joined as defendants later. The districts' sole connection with the case was and is as contractors with the United States with the contractual obligation to take and pay for water delivered to them from Friant Dam. They have never asserted nor do they have any control over the operation of Friant Dam or any right to receive a water supply from it except under their contracts. However, inasmuch as their agricultural economy requires continued delivery of such a water supply, the districts have opposed the plaintiffs' efforts to frustrate the Central Valley Project plan of operation on which the supply depends.

In their complaint, the plaintiffs challenged the constitutional authority of the United States to operate the Central Valley Project. 1 R. 24, 25, 28. A three-judge district court was impaneled. 28 U.S.C. § 2282. At the hearing before the three-judge court counsel for the plaintiffs elaborated the claim of unconstitutionality as follows:

> "I frankly am resting the most strongly upon the question of unconstitutionality based upon the

> theory that the Feasibility Report of President Roosevelt dated December 2, 1935, intends to divert all the water at Friant, that the only way Congress could do that is as an aid of navigation. The Friant Dam bears no substantial bearing to the aid of navigation. . . .
>
> "Secondly, that you cannot take one farmer's water . . . it is my position that based upon the assumption that the government under the Feasibility Report is going to divert the entire flow, that they are going to take the water of one farmer and give it to another for agricultural purposes or identical uses. It is my position that that is not a public use and it is beyond the powers of Congress to do so." Transcript, Mar. 8, 1950, p. 18, see also pp. 40-41.[6]

The three-judge court held that there was no substantial constitutional question, 1 R. 83, 90 F. Supp. at 780, thereby correctly anticipating the holdings of the Supreme Court in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 738 (1950), and *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 294 (1958), and the analogous cases of *Berman v. Parker*, 348 U.S. 26 (1954), and *Starr v. Nashville Housing Authority*, 354 U.S. 916 (1957). No review of this ruling was sought.

After dissolution of the three-judge court there was left at large the issue whether the Secretary of the Interior had statutory authority to acquire the plain-

[6]The Feasibility Report is reprinted in 90 F. Supp. at 823-27, and in 1 Engle, Central Valley Project Documents, H. R. Doc. No. 416, 84th Cong., 2d Sess. 562-67 (1956). References herein are to 90 F. Supp.

tiffs' rights to the extent that they may be impaired by the operation of the Central Valley Project. The district court, denying motions to dismiss by the defendant federal officials and the two districts originally named as defendants, 90 F. Supp. at 780, held:

> "Turning, then to the texts of the Acts of Congress dealing with Central Valley, there cannot be found therein any language which requires or suggests any intention by any Act of Congress to take the water rights of these plaintiffs and their class without compensation, or to take them at all, for that matter." 90 F. Supp. at 791.

And after reviewing the Feasibility Report the district court held:

> "The conclusion may be justified that the report indicated an intention to take all the water below Mendota and replenish it with other water. This court can see no justification for the conclusion that Congress, in making appropriations on the basis of the feasibility report indicated an intention to take water rights of the plaintiffs' lands above Mendota." 90 F. Supp. at 792.[7]

When the Delta-Mendota Canal was completed in 1951, 7 R. 37, 142 F. Supp. at 45, it first became possible to substantially reduce the flow of the river through Friant Dam and to substantially curtail the amounts passing the plaintiffs' lands. Early in July 1951 the plaintiffs sought to enjoin such reductions,

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[7]Mendota is the point where the Delta-Mendota Canal discharges water from the Sacramento River to replace the waters of the San Joaquin diverted at Friant. 7 R. 36-37, 142 F. Supp. at 45.

and eventually a consent temporary restraining order was entered by which the district court undertook to control releases from Friant to the river and appointed an agent for that purpose. 7 R. 8-12. Similar orders were made in 1952 and 1953. The United States withdrew its consent to the last such order, *United States v. United States District Court,* 206 F. 2d 303 (9th Cir. 1953), and since June 30, 1953, the United States, through the defendant officials and other employees, has operated the dam without judicial interference. Transcript, June 30, 1953, pp. 22182-83; Ex. Pffs. 404A, 404B, 610D, 610E, Transcript, Dec. 14, 1954, pp. 23139-41.[8]

The trial began on January 29, 1952 on the question of the plaintiffs' rights against the defendant officials and the districts, and continued for some 202 trial days. Transcript, July 13, 1953, p. 22685. On May 7, 1953, shortly before the trial concluded, the City of Fresno and the Tranquillity Irrigation District were permitted to intervene as plaintiffs, 1 R. 195-98, as-

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[8]The plaintiffs also sought originally to state a cause of action based on destruction of fish below the dam. 1 R. 11-12. The district court held that the right to maintain fishlife had to be asserted by the State of California. 90 F. Supp. at 783, 801. The State thereafter intervened seeking to require mandatory releases from Friant to protect fish below the dam, but in August 1951 it was allowed to change its position. 142 F. Supp. at 49-50, 7 R. 44-45.

Thereafter it essentially supported the defendants and opposed the plaintiffs' claims for injunctive relief as destructive of the Central Valley Project plan conceived by the State of California. 1 R. 88-98; 18 Ops. Cal. Atty. Gen. 31 (1951); *cf. Federal Power Comm'n v. Oregon,* 349 U.S. 435 (1955). The district court finally held that it could grant no relief for or against the State, 3 R. 958-59, 1005; 142 F. Supp. at 69, 7 R. 77, and dismissed it without liability for costs. 3 R. 1030.

serting that their rights to surface and underground water were being interfered with by Friant Dam and requesting the same type of injunctive relief against the defendant as did the original plaintiffs. 1 R. 182-1 through 182-44.[9]

On September 18, 1953, some weeks after the decision of the Court of Appeals in *United States v. United States District Court,* 206 F. 2d 303, the United States was joined as a defendant on the basis of the McCarran Amendment, § 208, the rider to the Department of Justice Appropriation Act, 1953, 66 Stat. 560 (1952), 43 U.S.C. § 666, 142 F. Supp. at 85, 7 R. 104; 1 R. 336-38. In August 1954 the plaintiffs for themselves and their purported class, Tranquillity, and Fresno, filed amended and supplemental complaints purporting to state causes of action against the United States. 1 R. 476, 505, 535. The United States having failed to answer, hearings were held on the basis of Federal Rules of Civil Procedure, rule 55(e), 142 F. Supp. at 52, 85-89, 7 R. 48-49, 105-111, beginning on December 3 and continuing through December 31, 1954.

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[9]The present status of Tranquillity Irrigation District is mysterious. The Court of Appeals stated: "This court is now advised that the dispute between this irrigation district and the Bureau of Reclamation has been resolved by agreement and no longer constitutes an issue upon appeal." 293 F. 2d at 342 n. 1, 7 R. 365. We assume this statement is correct because it was never challenged by a petition for rehearing. Nevertheless Tranquillity opposed the petition for certiorari filed by the districts. Brief in Opp. to Pet. for Writ of Cert., filed on behalf of City of Fresno, Tranquillity Irrigation District and other respondents in *Delano-Earlimart Irrigation District et al. v. Rank et al.*, October Term 1961 No. 966.

The district court announced its opinion in the case in chief on February 7, 1956, 142 F. Supp. 1, 7 R. 22, and thereafter held hearings on certain phases of the "physical solution", 1 R. 683; 142 F. Supp. at 194, 7 R. 287. The district court judgment was entered on June 21, 1957. 3 R. 960-B.

That judgment declared the water rights of all the plaintiffs, i.e., the named plaintiffs, the members of the class they purport to represent, and the plaintiffs in intervention Tranquillity Irrigation District and City of Fresno, against the defendants, i.e., the United States, the federal officers, and the districts. It did not adjudicate the rights of the plaintiffs against each other. 3 R. 862-63; 142 F. Supp. at 36, 155, 7 R. 27-28, 220. The general purport of the judgment was that the plaintiffs:

> "have been, now are, and will be entitled to the full natural flow of the San Joaquin River past Friant at all times . . . unless and until the physical solution herein elsewhere described is erected and constructed [by the defendants] within a reasonable time and thereafter operated as herein elsewhere set forth." 3 R. 993; see also 3 R. 928, 953, 1016, 1020-21.

The physical solution was a series of ten dams to be placed across the San Joaquin River, 3 R. 1021, 1042, intended to keep the water level of the stream at the height equivalent to the natural flow, 142 F. Supp. at 166, 7 R. 238, or to simulate a flow of 2000 cubic feet per second. 142 F. Supp. at 169, 7 R. 244.

The holdings of the district court on the critical legal issues were:

1. The United States was properly joined as a defendant under the terms of the waiver of sovereign immunity in the McCarran Amendment, § 208 of the Department of Justice Appropriation Act, 66 Stat. 560, 43 U.S.C. § 666. 142 F. Supp. at 85, 7 R. 104. It is therefore subject to the injunctive power of the court in enforcing a decree adjudicating and administering the water rights involved. 142 F. Supp. at 175-76, 7 R. 253-55; 3 R. 1005-06.

2. At the time this action was instituted and for many years before the authorization or construction of Friant Dam the plaintiffs had, and still have, vested water rights to the full natural flow of the San Joaquin River for surface diversion and for replenishing the ground water under their lands. These rights are superior to any rights of the United States or the other defendants. 142 F. Supp. at 115-116, 7 R. 155-56, 3 R. 920, 992.

3. The operation of Friant Dam, in storing and diverting San Joaquin River water into the Friant-Kern and Madera Canals, does not permit enough water to flow down the river to satisfy such vested rights, and thus is an interference with them. 142 F. Supp. at 116, 7 R. 156, 3 R. 936, 997.

4. Congress has not authorized the taking of vested water rights for the Central Valley Project by physical seizure against the will of the owners thereof; the relevant statutes provide that the power of eminent domain can be exercised only by judicial proceedings to condemn, which the United States has never brought. 142 F. Supp. at 91-94, 104, 7 R. 114-19, 135-

36; 3 R. 1008. Further, it is questionable whether Congress has authorized the acquisition of the plaintiffs' rights at all, even by judicial proceedings to condemn. 142 F. Supp. at 97, 101, 102, 7 R. 125, 131, 133.

5. As a consequence, the impounding and diversion at Friant Dam by the United States and the defendant officials of water needed to satisfy these prior vested rights constitutes an unauthorized and unlawful invasion of vested rights, 142 F. Supp. at 116, 7 R. 156; 3 R. 936, 997, for which damages at law are not a plain, speedy and adequate remedy. 142 F. Supp. at 160, 7 R. 229; 3 R. 944, 997-98, 1005.

6. In order to satisfy the vested rights of the plaintiffs, the defendants, including the United States, are enjoined from storing or diverting or otherwise impeding or obstructing the full natural flow of the San Joaquin River at Friant Dam, unless within a reasonable time the United States or the defendant districts at their own expense construct and put in operation the specific physical solution which the district court concluded is necessary to satisfy those vested rights as well as would the full natural flow of the river. 3 R. 928, 929, 953, 1004, 1016, 1021. Absolute and unlimited power to modify the physical solution is reserved. 3 R. 1027.

7. The United States is subject to the restrictions of the California county of origin and watershed of origin statutes. Calif. Wat. Code §§ 10505, 11460-11463. Under those statutes the United States, prior to diverting San Joaquin River water at Friant Dam

beyond the watershed or counties of origin, must deliver such water to satisfy the full needs of the City of Fresno and the Tranquillity Irrigation District at prices no greater than charged the districts for firm agricultural water service. 142 F. Supp. at 153-54, 177, 184-85, 7 R. 217-18, 256-57, 268-69; 3 R. 941-42, 1014-18.

8. The United States is subject also to California Water Code §§ 106 and 106.5 declaring State policy concerning domestic use and the rights of municipalities to acquire and hold water rights; these statutes also require the United States to satisfy the needs of the City of Fresno before diverting water outside the watershed and counties of origin. 142 F. Supp. 184-185, 7 R. 268-69; 3 R. 957, 1017-18.

C. JUDGMENT OF THE COURT OF APPEALS

On appeal from the district court judgment by the United States, the defendant federal officials, the State of California, and the districts, the Court of Appeals held as follows in its opinion and judgment entered March 31, 1961:

1. The joinder of the United States was not authorized by the McCarran Amendment, and hence the United States should be dismissed as a defendant. 293 F. 2d at 346-48, 7 R. 372-376.[10]

2. Contrary to the district court's holding, the United States is authorized, through exercise of the

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[10]Only the City of Fresno has sought to review that dismissal. *City of Fresno v. State of California*, October Term 1962 No. 51.

power of eminent domain, to acquire such of the plaintiffs' rights as may be needed for the project, 293 F. 2d at 353-54, 7 R. 384-85, and to do so by physical seizure without judicial proceedings in eminent domain. 293 F. 2d at 354-55, 7 R. 386-387.

3. State law, such as the California county of origin and watershed of origin statutes, California Water Code sections 10505, 11460-11463, cannot restrict this federal power of eminent domain, 293 F. 2d at 354, 7 R. 385, and cannot compel the United States to serve project water except as federal officials, acting within their authorized administrative discretion, enter into agreements to do so. 293 F. 2d at 351-353, 7 R. 381-383. Thus, the district court judgment must be reversed insofar as it attempts to prescribe the terms upon which the plaintiff City of Fresno is entitled to receive water from Friant Dam. 293 F. 2d at 353, 7 R. 383.

4. While the United States has the power to acquire the plaintiffs' rights by physical seizure, no such taking has in fact occurred because of the equivocal character of the government's actions. Accordingly, the plaintiffs still retain their rights, and the interference with them which the district court found resulted from the operation of Friant Dam is an unauthorized trespass by federal officials which may be enjoined. On this basis, the injunctive features of the district court judgment were affirmed. 293 F. 2d at 355-60, 7 R. 387-394.

Petitions were filed by the districts for rehearing on the issue whether, in light of the dismissal of the

United States as a party defendant, the districts had any proper role in the litigation and should not also be dismissed. These petitions were granted, 7 R. 396, and upon rehearing the Court of Appeals ordered the injunction modified to make it inapplicable to the districts. 7 R. 401-403. The Court of Appeals thus acknowledged that there was no basis to grant the plaintiffs any relief against the districts. Nevertheless, the Court of Appeals refused to dismiss the districts as defendants or to alter the assessment of trial costs against them. 7 R. 400-401. Therefore, the districts still remain parties in the litigation, although, as stated by the Court of Appeals, the absence of the United States and the Secretary of the Interior "has posed perplexing questions respecting the appropriateness of issues raised in the district court and respecting the effectiveness of the determination of those issues." 7 R. 400. And the districts alone must bear the full burden of the trial costs totalling $13,636.33, 3 R. 1030, although they have never asserted, and do not now have and never have had, the power to perform or stop the performance of the acts of operation of Friant Dam which the judgment, as affirmed by the Court of Appeals, has held to be wrongful and has enjoined.

SUMMARY OF ARGUMENT

The Court of Appeals correctly held that the Secretary of the Interior acting for the United States is authorized, through exercise of the power of eminent

domain, to acquire the plaintiffs' water rights for the Central Valley Project, and to do so by physical seizure without judicial proceedings to condemn. However, the Court of Appeals was in error in holding that this power has not in fact been exercised, and in sustaining the district court's injunction on that basis.

The actions of the defendant federal officials in operating the project being authorized by a constitutional statute, the resulting interference with the plaintiffs' rights cannot be enjoined on the ground that it is an illegal day to day trespass upon such rights. A water right is a usufruct attached to the land, which contributes to its value. Without invasion of the land, the water right may be taken through physical seizure by upstream interference with the availability of water needed to satisfy the right. The damages for the taking of the right are measured by the reduction in the value of the land.

Here through operation of Friant Dam, the flow of the river has for many years been reduced drastically below that deemed necessary by the district court to satisfy the plaintiffs' rights; the reduction of flow has been carried out pursuant to a long-standing, well-publicized plan of project operation; and the Secretary of the Interior has announced his recognition of the government's obligation to compensate those whose rights may have been thereby impaired. These factors make the impairment of the plaintiffs' rights a compensable taking rather than an enjoinable tort. Accordingly the case should be entirely dis-

missed and the plaintiffs remitted to their remedy for damages.

In any event, the judgment should be reversed against the districts because the plaintiffs have failed to prove any right to relief against them. The districts' interest in this case is solely as contractors with the United States for a water supply from the Central Valley Project. The validity of their contracts has not been, nor, in light of *Ivanhoe Irr. Dist. v. McCracken*, 357 U.S. 275 (1958), could it be, successfully challenged in this case, particularly in the absence of the United States as a party. The districts have never asserted, and there has been no proof, finding or judgment that they have, any control over the operation of Friant Dam or the actions of the defendant federal officials in such operation, which the judgment would enjoin.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT THE UNITED STATES HAS NOT ACQUIRED THE RIGHTS OF THE PLAINTIFFS WHICH HAVE BEEN IMPAIRED AND IN SUSTAINING THE INJUNCTION

On the issue whether the United States, through exercise of the power of eminent domain, has acquired the rights of the plaintiffs which have been impaired by the operation of Friant Dam, the district court took two positions. Originally it held that the federal officers were not authorized to take the

plaintiffs' water rights at all.[11] But finally it held that although the plaintiffs' rights could be taken, they had to be taken by judicial proceedings and could not be taken by physical seizure.[12]

The Court of Appeals held to the contrary on both scores. "We conclude that the United States has the power to acquire the rights of these plaintiffs through exercise of eminent domain." 293 F. 2d at 354, 7 R. 385. "We conclude that the District Court was in error in ruling that the only means, other than purchase, by which the United States may acquire title to water rights for the Central Valley Project is through judicial proceedings in condemnation." 293

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[11] In denying the motion to dismiss the district court held:

> "[A demand for damages from the United States] would contemplate a lawful taking. . . . It appears from what has been said that there was and is no congressional intention to take plaintiffs' water rights at all. . . . It is clear from what has been said that Congress did not authorize the taking of their [plaintiffs'] water rights, much less without compensation . . ." 90 F. Supp. at 804.

See also 90 F. Supp. at 791, 799-800, 802-03.

[12] Referring to § 7 of the Reclamation Act of 1902 the district court held:

> "From the text of this section it cannot be denied that the Secretary of the Interior has been granted the discretion to exercise the power of eminent domain on behalf of the United States by appropriate judicial proceedings. But in order to take water rights for a reclamation project it is clear that it must be done in judicial proceedings." 142 F. Supp. at 92, 7 R. 116.

In considering § 2 of the Rivers and Harbors Act of 1937, reauthorizing the Central Valley Project, the district court emphasized the reference to "proceedings in eminent domain" as supporting its holding that judicial proceedings are the exclusive method of taking property under the power of eminent domain. 142 F. Supp. at 92-94, 7 R. 116-19. Passed over by the court, however, was the significance of the words "or otherwise." See section in this brief, *supra*, on Statutes Involved.

F. 2d at 355, 7 R. 387. No review of these rulings has been sought.

The Court of Appeals held, however, that the authority of the United States to acquire the plaintiffs' water rights by physical seizure had not been exercised. 293 F. 2d at 358, 7 R. 392. It felt that the taking of water was not a seizure of the plaintiffs' water rights, which is authorized, but a "mere," "transitory" or "day to day trespass" upon such rights. Such trespass, it held, to be a wrong for which there was no remedy by way of compensation and which, therefore, should be enjoined. 293 F. 2d 357-58, 7 R. 390-91.[13]

The Court of Appeals declined to apply the principle of *Larson v. Domestic & Foreign Corp.*, 337 U. S. 682 (1949). 293 F. 2d at 351, 7 R. 379-80. It failed to recognize that the fact that it had characterized the defendants' conduct as a trespass on the

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[13]Unlike *Malone v. Bowdoin*, 369 U.S. 643 (1962), this is not a case where the authorized defendant official denies liability. Here the liabilities are authorized to be incurred and the duty to pay has been recognized.

The Court of Appeals' characterization of the withholding of the water as "consistent with a transitory trespass," *i.e.*, as a tort, rather than as a taking, ignores the fact that the Secretary of the Interior expressly acknowledged the obligation of the United States to pay. For example, the Secretary referred to the "payment of money" for private rights, and to compensation of "landowners for substitution of wells" etc. 7 R. 298. Thus, even under the strictest tests of Tucker Act jurisdiction, it is clear that the conduct of the defendant officials cannot be regarded as merely tortious but gave rise to an implied contract on which the government was liable. Compare *Hill v. United States*, 149 U.S. 593, 598-99 (1893), with *United States v. North American Co.*, 253 U.S. 330, 333 (1920). The availability of a suit for damages against the United States precludes an injunction against the defendant officers as individuals. *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932).

plaintiffs' rights did not establish that the defendants' action was unauthorized.

> "The mere allegation that the officer, acting officially, wrongfully holds property to which the plaintiff has title does not meet the requirement [that it must also appear that the action to be restrained or directed is not action of the sovereign]. True, it establishes a wrong to the plaintiff. But it does not establish that the officer in committing that wrong, is not exercising the powers delegated to him by the sovereign." 337 U. S. at 693.

This proposition has been made even more explicit in *Malone v. Bowdoin,* 369 U. S. 643 (1962), where this Court reiterated the proposition that to establish that the action is not an effort to enjoin the United States, it must be shown either that the defendants' conduct is unconstitutional or that it is beyond some "relevant statutory limitation" upon the defendants' authority. 369 U. S. at 647.

In the instant case the Court of Appeals held that the defendants were authorized by statute to acquire the plaintiffs' rights by physical seizure.[14] It did not

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[14]The general principles were recently restated in *United States v. Dow,* 357 U.S. 17, 21 (1958):

> "Broadly speaking, the United States may take property pursuant to its power of eminent domain in one of two ways: it can enter into physical possession of the property without authority of a court order; or it can institute condemnation proceedings under various Acts of Congress providing authority for such takings. Under the first method—physical seizure—no condemnation proceedings are instituted, and the property owner is provided a remedy under the Tucker Act, 28 U.S.C. §§ 1346(a)(2) and 1491, to recover just compensation."

point to, nor is there, any "relevant statutory limitation" upon the defendants' authority. In lieu of a statutory limitation the Court of Appeals found a limitation inherent in the nature of water rights. It held:

> "The peculiar characteristics of a water right as property are such as to demonstrate that seizure of such a right requires something more of a condemnor than would be necessary in the seizure of other types of property." 293 F. 2d at 357, 7 R. 390.[15]

The Court of Appeals emphasized that a water right is a usufruct, 293 F. 2d at 357 n. 9, 7 R. 390, *i.e.*, the right to have the liquid flow and to use it as it flows past one's land. 1 Wiel, Water Rights in the Western States §§ 15-19 (3d ed. 1911). The distinctions between riparian and appropriative rights are not significant in this regard; both types of rights are usufructuary. *Id.* § 18. The importance of the usufructuary nature of water rights in the instant case is twofold: (1) The taking of a water right need not involve an invasion of the owner's land. (2) The damages for taking of the right are measured by the changes in the market value of the land over or through which the water flowed, not by the value of the water taken. Summarizing the law in a case fac-

[15]Consistent with its theory that water rights have peculiar characteristics which are relevant here, the Court of Appeals gave particular attention to "an action in the field of water rights," *Ickes v. Fox*, 300 U.S. 82 (1937). *Ickes v. Fox*, however, does not appear to be based on any peculiarity of water rights. As was pointed out in *Larson*, it can be rationalized as an attempt to violate statutory restrictions on the officers' authority. 337 U.S. at 702, n. 26.

tually similar to the instant one, the California Supreme Court said:

> "Besides, while the riparian right is a part and parcel of the land in a legal sense, yet it is a usufructuary and intangible right inhering therein and neither a partial nor a complete taking produces a disfigurement of the physical property. The only way to measure the injury done by an invasion of this right is to ascertain the depreciation in market value of the physical property. . . . There was a distinct conflict in the evidence as to whether the lands of appellant had a greater or less market value after the taking by respondent, *but there is no question of law arising on the evidence". Collier v. Merced Irr. Dist.*, 213 Cal. 554, 571-72, 2 P. 2d 790, 797 (1931). Emphasis added.

The older writers analogized interference with water rights to interference with other usufructs such as light and air. 1 Wiel, Water Rights in the Western States § 15 (3d ed. 1911). It is, indeed, difficult to see how the taking of a water right, which causes no disfigurement to the land, is any different in principle from the taking of air space over land, which similarly causes no disfigurement to the land but decreases the uses to which the land might otherwise be put and hence decreases its market value. *Cf. Griggs v. Allegheny County*, 369 U. S. 84, 89-90 (1962); *United States v. Causby*, 328 U. S. 256, 261-63, 267 (1946); *Portsmouth Co. v. United States*, 260 U. S. 327, 329 (1922). On "non-physical takings" generally, see 2 Nichols, Eminent Domain § 6.3 (3d ed. 1950).

In none of these cases was the fact of taking disputed because the exact details of the condemnors' operations had not been established. Nevertheless, in this case the Court of Appeals held that the United States had not seized the plaintiffs' rights, because it believed that the conduct of the Secretary of the Interior was equivocal. 293 F. 2d at 356, n. 8, 7 R. 388; that the taking of water standing alone is equivocal, 293 F. 2d at 357, 7 R. 390-91; and that there could be no taking until the plaintiff knows:

> "what of his right has been taken: as to amounts, as to flows, as to methods of diversion. And he must have this knowledge not after the fact but at the time the interference occurs. Otherwise, the interference is more consistent with a transitory trespass upon his water rights than with a physical seizure of them." 293 F. 2d at 358, 7 R. 391.

We contend that the Secretary's conduct was not equivocal and did constitute a taking.

To paraphrase the holding in *Portsmouth, supra,* when the government acted "with the purpose and effect of subordinating" the plaintiffs' lands to its uses "whenever it saw fit," and "with the result of depriving the owner of its profitable use [there was] the imposition of such a servitude [as] would constitute an appropriation of property for which compensation should be made." 260 U. S. at 329.

It seems obvious that there has been such taking of a servitude here. The flow of the river has been reduced to about one-fourth of what the district court

believed was necessary to satisfy the plaintiffs' rights. 293 F. 2d 358, n. 10, 7 R. 392. There was the purpose of subordinating the plaintiffs' right to the United States' use. These reductions were part of a long-standing plan which the Secretary of the Interior initiated in 1941, continued through the years, and reiterated in March 1953 at the request of the district court.[16] As part of the plan the Secretary recognized the obligation to compensate the plaintiffs and described the operating criteria by which he would be guided. 7 R. 298. This conduct and announced purpose is far more firm and definite than the vagaries of operation from which takings were inferred in *Griggs, Causby* and *Portsmouth.*

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[16]See the letter and memorandum reprinted in 7 R. 295-304. Congress has been advised of this program several times, *e.g.*, 2 Engle, Central Valley Project Documents, H. Doc. No. 246, 85th Cong. 1st Sess. 616 (1957):

"FRIANT-to-GRAVELLY FORD CONTRACTS

"In the 37-mile reach of the San Joaquin River immediately below Friant Dam and extending to a point below the Gravelly Ford Canal, there are approximately 230 small land holdings with varying requirements of irrigation. Negotiations were conducted with this group of land owners for more than a decade, resulting in 99 water rights adjustment contracts and 17 supplemental contracts. Some of these provide for the construction by Reclamation of minor irrigation facilities, some for the performance of river channel work, and some for cash payments to the land owners. The total amount of water represented is relatively small compared to that involved in the Miller & Lux and other principal contracts. The Friant-to-Gravelly Ford Contracts are tabulated herein on page 618. Several cases went to litigation in the action known as *Rank v. Krug*, which is reported in Chapter XIX, p. 734."

As of December 4, 1952, the United States had entered into 215 such contracts involving 11,687.9 acres at a cost of $215,325. Ex. Dfts. B-1, Transcript, Jan. 22, 1953, p. 14999. See also Graham, *The Central Valley Project: Resource Development of A Natural Basin*, 38 Calif. L. Rev. 588, 598-99 (1950); 3 R. 914-18, 995-96.

The Court of Appeals was troubled by the fact that the Secretary wrote that his plan "is an administrative one, voluntarily assumed and voluntarily to be executed." 293 F. 2d at 356, n. 8, 359, 7 R. 389, 393. This phrase has to be understood in the total light of this protracted litigation. It was an announcement to the district court that the Secretary intended to execute his plan, not the district court's plan, and was a prelude to the successful application for extraordinary relief in *United States v. United States District Court,* 206 F. 2d 303 (9th Cir. 1953).

But the Court of Appeals felt that the Secretary's statement of his intention to exert his unquestioned authority introduced such an element of uncertainty that injunctive relief was proper. 293 F. 2d at 359, 7 R. 393. It recognized a present loss of property values, but believed damages were an inadequate remedy because they could not be measured. 293 F. 2d at 358, 7 R. 391. However, the damages can be readily measured by ascertaining the difference in the market value of the plaintiffs' lands before and after the imposition of the servitude. This has been routinely done in similar cases. *Collier v. Merced Irr. Dist., supra,* 213 Cal. at 571-72, 2 P. 2d at 797; *Gerlach Live Stock Co. v. United States,* 111 Ct. Cls. 1, 49, 68 (1948); *United States v. Causby, supra,* 328 U. S. at 259.

The defect in the reasoning of the Court of Appeals is shown by the following: (1) The maximum amount of damage the plaintiffs can suffer is the total value of their lands. (2) The Secretary's plan

of operation of the dam to some degree reduces the total amount of this damage. (3) The uncertainties of the Secretary's plan, if there be any, go to the amount of the reduction of damage, not to the fact of taking, because the taking is authorized and physically indisputable. The plaintiffs have suffered a partial rather than a complete taking of their water rights; the Secretary's plan is simply one of the elements to be considered in determining the extent of the taking. *Collier v. Merced Irr. Dist., supra,* 213 Cal. at 566-69, 2 P. 2d at 794-96.

II. THE JUDGMENT AGAINST THE DISTRICTS MUST BE REVERSED FOR LACK OF A JUSTICIABLE ISSUE BETWEEN THE PLAINTIFFS AND THE DISTRICTS

The district court imposed its injunction upon the United States, the defendant officials of the United States Bureau of Reclamation and the districts alike. 3 R. 1020. After the Court of Appeals, in its initial opinion and judgment, reversed the district court on the joinder of the United States as a defendant and ordered the United States dismissed, 7 R. 376, 395, the districts petitioned for rehearing on the ground that they too should be dismissed.

Upon rehearing, the Court of Appeals recognized the correctness of the districts' argument that they are under contractual obligation to the United States to accept delivery of water and that the injunction places them in jeopardy of contempt for complying with their contractual obligations and for acts of the individual defendants over which they have no con-

trol; accordingly, the injunction was ordered modified so as not to be applicable to the districts. 7 R. 401-402. However, the Court of Appeals refused to reverse the remainder of the judgment against the districts. In this refusal, we believe the Court committed error.

Beyond their duty to accept and pay for water pursuant to their contracts with the United States, the districts have absolutely no connection with this case. There can be no doubt as to the validity of these contracts, since those of the Madera and Ivanhoe districts, which are substantially identical to the others, were reviewed and held valid by this court in *Ivanhoe Irr. Dist. v. McCracken*, 357 U.S. 275 (1958). At no time, nor in any of the proceedings in this case, has any attack upon the validity of these contracts been made by either proof, finding or judgment.

It is likewise beyond question that there has been no proof, nor attempt to prove, nor any finding or judgment indicating that the districts have any control, or have ever attempted to exercise any control over the operation of Friant Dam or over the defendant officials of the Bureau of Reclamation. On the contrary the district court found and determined, 3 R. 943, 1007, and the Court of Appeals conceded upon the rehearing herein, 7 R. 401-402, that the operation of the project facilities and the diversion of the water was done entirely by the defendant officials.

In these circumstances there is no legal or contractual relation between the districts and any party other than the United States. The districts have no control

over the defendant officials, and the officials can act for the districts only as agents of the United States in the performance of its contractual commitments. If the acts of the defendant officials exceed their authority so as to become subject to injunction, they are no longer acting for the United States nor, *ipso facto,* for the districts.

The plaintiffs failed entirely to prove any actual or threatened interference with their rights by the districts, and the district court neither found nor determined any such interference. It is true that the districts are vitally interested in the delivery of water to them by the United States under their contracts. Indeed, their very existence, and the investments of many millions of dollars in distribution systems and other works, are dependent upon this water. But this does not establish that they have participated or would participate in any unauthorized interference with the plaintiffs' rights. The effort of these districts throughout the case has been only to lend their assistance to see that the United States, properly and in conformity with its contractual undertakings, obtains and delivers their water supplies. To this end, and not at any time for their own individual accounts, the districts have sought to have determined what, if any, rights the plaintiffs have; whether and to what extent the operation of the project interferes with any such rights; and therefore the extent to which they have been or are being taken by the United States through the exercise of its power of eminent domain.

In considering the districts' contention that, with the dismissal of the United States, they should also be dismissed, the Court of Appeals upon rehearing conceded that, "There can be little doubt that absence of the United States and of the Secretary of the Interior has posed perplexing questions respecting the appropriateness of issues raised in the district court and respecting the effectiveness of the determination of these issues." 7 R. 400. The Court of Appeals conceded further that, while vigorous disputes took place in the district court, any resolution of these disputes "may be limited in effectiveness as res judicata due to the absence of certain interested parties." 7 R. 401. Notwithstanding, the judgment was allowed to stand "for whatever future effectiveness these determinations may have", even though the Court of Appeals could not "at this time conceive of any situation in which the language to which they [the districts] object would prove prejudicial." *Ibid.* The Court of Appeals concluded: "We are therefore reluctant to tinker blindly with it." *Ibid.*

It seems evident that the Court of Appeals was unable to find any justiciable issues between the plaintiffs and the districts, but decided that since the case had been tried at some length the judgment should be allowed to stand for "whatever future effectiveness" it might have. This is an astonishing result, in view of the fact that the burden of establishing a definite right to relief by appropriate proof was upon the plaintiffs. A justiciable issue supported by adequate evidence and findings, entitling the plaintiffs

to relief against the districts, and not merely a conjectural possibility that some illusory and undefined future issue may arise, is necessary to support the judgment.

There is thus no basis for any judgment in favor of the plaintiffs and against the districts. It is not enough that there be argument and difference of opinion between the districts and the plaintiffs as to the nature and extent of the plaintiffs' rights, and the extent to which they may have been taken by the United States. There must be a justiciable controversy between the plaintiffs and the districts. The absence of any claim to any interest in the plaintiffs' rights by the districts, except through the United States, leaves nothing to be adjudicated as to the districts in the absence of the United States.

The situation here is analogous to that in *Winford v. Griffin*, 1 F. 2d 224, 227 (8th Cir. 1924), where the court said:

> "In any event, there was no evidence, even Griffin did not testify, that he made claim to what is known as Goose Island or any part of it. Conceding, then, without deciding, that Winford and Wineman own Goose Island, they were not entitled to a decree quieting their title thereto as against Griffin, because he made no claim to it or any part of it."

See also, *Whitney v. Randall*, 58 Ida. 49, 58-59, 70 P. 2d 384, 388 (1937).

No judgment can be entered against the districts that would amount to anything other than an invalid

attempt to collaterally attack their contracts with the United States, which cannot be done when the United States is not a party. *Balter v. Ickes*, 89 F. 2d 856, 859 (C.A.D.C. 1937).

CONCLUSION

For the reasons stated above, it is urged that the judgment of the Court of Appeals should be reversed with directions that the action be dismissed.

Dated, October 23, 1962.

Respectfully submitted,

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